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Supreme Court of the United States

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

vs.

THE IRVING TRUST COMPANY, as Trustee of United Cigar Stores Company of America, Debtor, *et als.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A REHEARING

PERLIE P. FALLON,
Counsel.

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To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

The petitioner respectfully asks for a rehearing on the ground that the parties did not proceed under paragraph "Twentieth" of the lease.

Paragraph "Twentieth" is, by its provisions only applicable where "the terms of this lease be ended in the manner provided in the last preceding article of this lease" (R. 19). The last preceding article, "Nineteenth", covers a cancellation by the lessor by a ten-day written notice given by registered mail for a default existing sixty days

after notice and demand also given by registered mail. "Twentieth" provides that, upon notice of cancellation given in the manner provided under "Nineteenth", the insurance policies, subleases and improvements *ipso facto* become the property of the lessor as liquidated damages. The clause is, therefore, not made automatically operative upon a default.

The lease was not cancelled under paragraph "Twentieth" after the rejection. It was assigned by the United to Frelem Realty Corporation. This is shown by paragraph "First" of Exhibit 1 (R. 61, fol. 89). Exhibit L (R. 106) shows that the petitioner refused the United's proposal that the lease be cancelled by executing a new lease. That letter carefully refrains from cancelling the lease. The lessor might relet under the Nebraska law. In it and in none of the correspondence is there a suggestion that the petitioner will accept the insurance policies, improvements, subleases, and rents, on which petitioner had a lien under "Eighteenth", as liquidated damages. The petitioner refused an assignment to her and insisted the papers be changed. First paragraph of "I. Lease", R. 123. The Frelem Realty Corporation accepted the assignment. "(9)" of Ex. "R", R. 131. The negotiations of the parties are merged, of course, in the agreements which they actually executed. The insurance policies had been caught under "Eighteenth" creating a lien on them (R. 17). Their assignment is therefore no evidence the parties acted under "Twentieth". The rents accrued since the bankruptcy reverted to the lessor by virtue of the rejection as well as under "Eighteenth". The improvements, subleases and rents were also within the lien (R. 17). Their assignment does not indicate action under "Twentieth". Further, the respondents in the footnote 8 on page 18 of their brief

state: "In the instant case, instead of being cancelled, the lease was assigned and modified and as such has apparently been performed."

Assignment of the lease is covered by paragraph "Twenty-Fifth" (R. 20). It is, therefore, separately dealt with in the lease. "Twenty-Fifth" says that the lease may be assigned only after the building is erected and, if it is assigned before the building is erected, then, the United must deposit Twenty-Five Thousand Dollars as security and the obligation of the assignee to perform all of the covenants of the lease. It then goes on to say, "any sale, assignment or conveyance of this lease except in the manner and under *all* the terms and conditions stated shall be void *and a violation of the terms and conditions of this lease*" (R. 21). The petitioner did not waive this provision since she made a reservation in the assignment agreement which the Court has held sufficient to cover a claim for damages for breach of the lease under Sec. 77B. The petitioner proved at the hearing before the Special Master that the United had not complied with the assignment clause "Twenty-Fifth". Last paragraph of Ex. "B. (a)" R. 74; and admission at fol. 62, R. 40, and proceedings at fol. 63, R. 41.

The point is sustained by an analysis of the lease. The lessor contracted for several different rights and remedies. Paragraph "Eighteenth" gave the lessor a lien on the insurance policies, sub-rents and improvements in the event of a default and independently of paragraph "Twentieth". The "Twentieth" clause was designed to enable the lessor to enforce payment under the lease by a forfeiture of the building if the lessee did not cure an existing default. But the building might not be erected until 1942. Therefore it is conditioned on cancellation by notice alone at the lessor's

option so the lessor may use the clause or not as conditions warrant. "Twenty-Second", which is conditioned on termination otherwise than by cancellation, allowed the lessor to hold the improvements and subleases and rents accrued and to accrue and without these constituting liquidated damages (R. 19). The Court will note the closely-guarded words which introduce "Twentieth": "If the terms of this lease be ended in the manner provided in the last preceding Article of this lease * * *" (*i. e.*, cancellation by notice). It will contrast these with the sweeping words which introduce "Twenty-Second": "Upon the termination of the life of this lease whether by lapse of time or in manner provided for in this lease by the terms and conditions thereof or in any other manner whatsoever * * *" (R. 19). The United's entire interest in the estate was to pass under this clause but not as liquidated damages. There was also a right to relet under the Nebraska law (Petitioner's Reply Brief, p. 3). "Twenty-Fifth" made any assignment except on the precise terms of the clause regulating assignment a breach of the lease (R. 21). The United contracted that the enumeration of these various rights and remedies would not exclude the lessor from choosing among them. The last sentence of paragraph "Twenty-Seventh" is as follows:

> "Lessee covenants that the rights and remedies of lessor under this lease shall be cumulative *and no one of them shall be exclusively of any of the rights or remedies provided for in this lease or otherwise allowed by law.*" (Italics ours.) (R. 22.)

The provision that any assignment other than in the manner set forth in the assignment clause would be a breach of the lease and the reservation support the claim filed. Section

77B is a remedy "otherwise allowed by law". The reservation evidences an intent not to close the matter on the terms of paragraph "Twentieth". If that had been the intention, a reservation would not have been permitted by the United. There was not a cancellation of the lease as contemplated by "Twentieth" but an assignment of it and the United did not effectively release its assets under the bankruptcy power from the consequences of the clause "Twenty-Fifth" or from a breach of the lease because of the reservation.

WHEREFORE, the Petitioner respectfully asks that she be granted a rehearing and such other and further relief as the Court shall deem just.

PERLIE P. FALLON,
Counsel for Petitioner.

I HEREBY CERTIFY that I am counsel for Mrs. John S. Meadows, the Petitioner herein, that I prepared the foregoing petition for a rehearing, that it is not being used for purposes of delay, that it has merit in both law and fact, that it is deserving of the consideration of the Court and that it is filed in the interests of Justice.

Dated, January 6, 1937.

PERLIE P. FALLON.

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